IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.593 OF 2004
IN
SUMMARY SUIT NO.1858 OF 2004

Forbes Gokak Ltd. ..Plaintiffs

Vs.

Oriental Bank of Commerce ..Defendants

Mr.Ravi Kadam a/w Mr.Clistofer D'souza i/b Prem Kanga for the plaintiffs

Mr.Shailesh Shah i/b Wadia Gandhy and Co. for the defendants

CORAM : S.U.KAMDAR, J
DATED : 14TH SEPTEMBER, 2005

P.C.:

1. The present suit is filed on a bank guarantee which is at Ex.C to the plaint. The said bank guarantee is for the sum of Rs.8,47,50,000/-. Clause 3 and 4 of the bank guarantee reads as under:

> "3. Now, therefore, in pursuance of the said clause 9 of the said MOU at the request of the

Developers, we the Global Trust Bank Ltd, Bombay for ourselves and our successors and assigns hereby absolutely, unconditionally and irrevocably guarantee (as primary obligator and not merely as surety) that in the event of the Developers failing, neglecting or refusing to duly observe and perform their obligations under or pursuant to clause 8(c) of the said MOU We shall pay to you forthhwith upon demand and without demur all sums due owing or payable by the Developers to you under or pursuant to the said clause 8(c) of the said MOU. Such demand by you shall be final and conclusive of the failure, neglect or refusal by or on the part of the Developers to pay to you the sum or sums dur owing or payable by the Developers to you under or pursuant to the said clause 8(c) of the said MOU.

4. We expressly agree that our liability and obligation under this Guarantee shall be continuing, absolute, unconditional and irrevocable irrespective of (i) any difference or dispute of whatsoever nature between the Developers and you under or pursuant to the said MOU or any other agreement that may, in pursuance of the said MOU be entered into by and between the Developers and you or any claims of whatesover, nature of the Developers made under or pursuant to the said MOU or any such other agreement entered into in pursuance thereof or (ii) the invalidity, irregularity or unenforceability of any reason of the said MOU or any such other agreement that may be entered into by and between the Developers and you in pursuance thereof or any of the obligations

> of the Developers under or in pursuance of the said MOU and /or such other agreement or any other circumstances or considerations which might otherwise constitute a legal or equitable discharge or defense of a surety of guarantee including without limitations any failure omission or delay in the enforcement by you of any of the obligations of the Developers under or pursuant to the said MOU or any such other agreement that may be entered into between the Developers and you in pursuance thereof.

2. It is the case of the plaintiffs that under the terms and conditions of the said bank guarantee defendant bank is liable to make payment of sum of Rs.8,47,50,000/-. It is further the case of the plaintiffs that the said bank guarantee is absolute and unconditional and therefore liability of bank to pay the amount under the said guarantee is without any demur and unqualified.

3. It is the case of the plaintiffs that under the memorandum of understanding entered into by the Videocon Properties Ltd. and the plaintiffs, the aforesaid Bank Guarantee has been given by the defendant. It is further the case of the plaintiffs that there is a breach of the terms and conditions of the MOU entered by and between the Videocon Properties Ltd and the plaintiffs and thus they are entitled to invoke the guarantee as contemplated under clause 54 thereof.It is the case of the plaintiffs that on 30.7.97 letter was addressed by the plaintiffs bank interalia recording therein that as mentioned under clause 8 of the Guarantee, a demand for payment was made by tendering a letter to Mr.Gopakumar Coratyl, Manager Corporate Banking, Opera House Branch of the defendant. However, he advised the plaintiffs to give the said letter for invocation of Bank Guarantee to Nariman Point office as account of Videocon Properties Ltd. has been transferred to Nariman Point office of the defendant bank. The said letter dt.30.7.97 has been delivered at 5.40 p.m. to 15, Maker Chambers III, Nariman Point

Office of the defendant bank. Thereafter plaintiffs issued another letter dt.29.4.98 invoking the said Bank Guarantee because in the meantime the said bank guarantee was extended by defendant bank upto 30.4.98 for a period of 3 months from the earlier expiry date of 14.1.98. This time the bank guarantee has been invoked by letter dt.29.4.88 by the defendant bank at Nariman Point office. It has been mentioned in the said letter as under

> "By Guarantee hereinabove referred, you had agreed to forthwith upon demand by us without demur pay to us all sums due owing or payable by Videocon Properties Ltd. to us under or pursuant to Clause 8(c) of the Memorandum of Understanding dated 29.12.94 made and executed between us and Videocon Properties Ltd. Demand by us is final and conclusive of the failure, neglect or refusal by or on the part of Videocon Properties Ltd. to pay

the aforesaid cum of Rs.8,47,50,000/- to us under or pursuant to the said MOU."

4. However inspite of the said invocation defendant bank did not make payment. The said Videocon Properties Ltd. filed a suit before the Senior Judge, Civil Division, Aurangabad being suit no.226 of 1998 and obtained an ex-parte ad interim order restraining the defendant bank from making payment under the said bank guarantee and restraining the plaintiffs from receiving the amount under the said guarantee. The said injunction order has been vacated by detailed order passed by learned Judge on 25.8.03. The plaintiffs has thereafter issued Advocate Notice on 26.8.03 to defendant bank to make payment under the said guarantee but the bank did not make payment and thus, the plaintiffs ultimately filed the present suit for recovery of said amount. The defendant has filed an affidavit in reply and raised the following contentions:

5. Firstly it has been contended that the guarantee given by defendant bank is not irrevocable and absolute. It has been contended that there are dispute between the plaintiffs and Videocon Properties Ltd. pertaining to alleged breach of the MOU and in view of the said dispute the invocation of the guarantee by the plaintiffs is improper and defendants are not liable to make payment under the said guarantee. It has been further contended that the terms of the guarantee interalia incorporates the terms of MOU executed between the parties i.e. plaintiffs and Videocon Properties. Thus, the defendants are not liable to pay the amount once there is dispute between the parties in respect of underlying transaction in the form of MOU. In support of the aforesaid contention, the learned counsel for the defendant has relied upon the Judgment of the Apex Court in the case of Hindustan Construction Co. Ltd. Vs. Sate of Bihar and Ors. reported in AIR 1999 Supreme Court 3710. On perusal of the said Judgment I am of the opinion that the terms and conditions of the said guarantee in the said case is different then in the present case. In the

present case, clause 3 and 4 of the said terms and conditions not only provides that the plaintiffs is liable to pay on demand and without any demur but the same is absolute on mere letter from the plaintiffs stating that the Videocon Properties have committed breach of the terms of MOU.The said Bank Guarantee further provides that as far as question of breach of he said MOU is concerned, the statement of the plaintiffs that there is breach shall be conclusive and binding on the defendant and the defendant would be bound to make payment . Clause 4 further provides that bank is liable to make payment under the said guarantee irrespective of any difference or dispute of whatsoever nature between the developer and the plaintiffs. In that view of the matter, I am of the opinion that the Judgment of the Apex Court has no application on the facts of the present case. Thus, I reject the aforesaid contention.

6. The learned counsel has thereafter contended that there is invalid invocation of the bank guarantee. It is contended that bank guarantee was extended upto 30.4.98 and thereafter

there is no extension. It has been contended that invocation dt.29.4.98 is effected by the plaintiffs during the pendency of the suit and operation of the ad interim order passed by the Civil Judge and therefore invocation on 29.4.98 is invalid in law. It has been further contended that bank guarantee having expired on 30.4.98 subsequent invocation on 8.2.00 is invalid in law and the liability of the defendant under the said guarantee stands discharged. In support of the aforesaid contention the learned counsel for the defendant has relied upon the Judgment of the Apex Court in the case of Surjit Singh and Ors Vs. Harbans Singh and Ors reported in (1995) 6 SCC 50. I am not inclined to accept the contention of the defendant. Firstly because there is no injunction of the Civil Judge restraining the defendant from invoking the bank guarantee. I am of the opinion that the orders passed by the court are not meant to harm any party but are meant to preserve the subject matter of the suit intact. If the interpretation of the order as canvassed by the defendants is accepted then in that event there is livelihood of prejudice being caused to the plaintiffs solely because of the

orders passed by the Court. Thus, I am not inclined to accept the aforesaid contention on the part of the defendants herein.

7. The third contention is that Videocon Properties Ltd. is necessary and proper party. The said contention is required to be stated to be rejected. rejected. Guarantee being independent contract the parties to the contract are only plaintiffs and defendant and therefore Videocon Properties Ltd. is neither necessary nor proper party in so far as suit is based on said bank guarantee is concerned.

8. The last contention of the learned counsel for the defendant is invocation is invalid because invocation is not in accordance with the terms of the guarantee. The learned counsel contends that the terms of the guarantee provides for invocation has to be by addressing a letter to the Opera House Branch of the defendant bank whereas letter dt.29.4.98 has been addressed by Nariman Point Office and thus, the invocation is not in terms of the contract. The said contention cannot be

accepted because it is on record that payment was demanded by invocation of guarantee by addressing the letter to the Opera House Branch of the Bank. However, Bank advised the plaintiffs that in view of the shifting of the account of Videocon Properties Ltd. from Opera House Branch to Main Office invocation letter must be addressed to the Nariman Point Office and the invocation is accordingly been done by the plaintiffs. Thus there is no merits in any of the contention of the learned counsel for the defendant. However with a view to given an opportunity to the defendant to defend the case I direct the defendant to deposit sum of Rs.8 crores within 4 weeks failing which plaintiffs will be entitled to decree. If the said amount is deposited the Prothonotary and Senior Master is directed to invest the same in any Nationalised Bank in Fixed Deposit initially for a period of 3 years and then renew the same from time to time till further orders of this court. If the amount is deposited then suit is to be transferred to the list of Commercial Causes. Written Statement or points of defence to be filed within four weeks from the date of deposit. Affidavits,

list of documents to be filed within four weeks thereafter. Inspection within four weeks thereafter. Suit to be on board of the learned Judge taking Commercial Causes.